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IN THE

Supreme Court of the United States

No. [redacted] 9

SWIFT & COMPANY, INC., and ARMOUR AND COMPANY,

Appellants,

—v.—

DON J. WICKHAM, Commissioner of Agriculture and Markets of the State of New York,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANTS

WILLIAM J. CONDON
WILLIAM J. COLAVITO
Attorneys for Appellant Swift & Company, Inc.
Office and P. O. Address
19 West 44th Street
New York 36, New York

EDMUND L. JONES
HOGAN & HARTSON
Attorneys for Appellant Armour and Company
Office and P. O. Address
800 Colorado Building
Washington 5, D. C.

IN THE

Supreme Court of the United States

No. 571

SWIFT & COMPANY, INC., and ARMOUR AND COMPANY,

Appellants,

—v.—

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANTS

1. *Action of the Administrator was reasonable.*

On page three of appellee's motion reference is made to Governor Rockefeller's veto message in connection with Assembly Bill Introductory #3782. The point is made that the bill would have permitted the sale of meat, poultry, etc., by total weight rather than net weight. In the interest of clarity it should be pointed out that we are talking at all times about net weight. The issue is not whether the labeling should indicate net weight or some other kind of weight. The issue is to what product or part of the product should the net weight statement refer. The federal action, as evidenced by appellants' labels, calls for a statement of the net weight of the poultry product. It cannot be too strongly emphasized that this is still a statement of *net weight* and does not include the weight of anything other than the food product. What New York requires is two statements of net weight. Again, the bill to which the quoted veto message was addressed would have permitted a single net

weight statement on combination foods which contain as one component meat, poultry or seafood. This bill was a verbatim copy of Section 32 of the Model Weights & Measures Law proposed by the National Conference of Weights and Measures. This Conference has as its principal objective the development of uniform statutes and regulations in the weights and measures field among the several states. To this end, it proposes a Model Law and Model Regulations. Operating under the Bureau of Standards of the United States Department of Agriculture, its membership is made up of weights and measures officials from every state in the Union. The Model Law and Regulations which emanate from the National Conference represent the combined views of its members.

The District Court in its opinion questioned the reasonableness of the refusal by the Department of Agriculture to permit multiple weight statements on stuffed turkeys and suggested that, if the question were squarely before it, it would hold this action to be unreasonable. In this connection, it seems that the court was exceeding its permissible function with respect to its review of the administrative action. To strike down such an action, the court would have to find that the Administrator was acting in an arbitrary and capricious manner and that there was no reasonable basis for his decision. It does not matter that the court itself would not make the same decision in the first instance. The court has no right to substitute its judgment for that of the Administrator. In this instance, the act of the Administrator in approving a single weight statement and disapproving a multiple weight statement was not only in accord with Department of Agriculture practice covering a span of 56 years, but also recognized the situation as it exists in 49 of the 50 states. In addition, it was also consonant with the recommended provision in the Model Law promulgated by the National Conference of Weights

& Measures. May the court properly say that the combined thinking of Weights & Measures officials in 49 states is unreasonable? Moreover, may the court properly reach this conclusion when the Director of Weights & Measures of New York State itself has testified that the contrary provision in the New York Law is impractical? (*S.M. 322*) His opinion on this is so strong that he readily admitted that no effort is made to enforce the New York Law with respect to any product other than stuffed turkeys (*S.M. 325-326*).

2. *Uniform labeling requirements for poultry products are essential to the free flow of commerce.*

There can be no argument that the labeling required by New York must be affixed to the product at the plant of manufacture. Since this is so, some sort of uniformity is a legitimate concern of the Department of Agriculture. If the State of New York can properly require additional information, then it must follow that 49 other states can each require such additional information as it considers its legitimate concern. That this is not merely an assertion without foundation is evidenced by the recent case of *Pacific Meat Company, Ltd. vs. Otagaki, 37 LW 2085, Hawaii Sup. Ct. (1964).*

That case involved a requirement by a statute of Hawaii that poultry products bear on their labels a statement indicating whether the poultry was island grown, mainland grown or foreign grown. The Supreme Court of Hawaii considered this statute to be a legitimate exercise of the state's power.

In our modern commercial society it is impossible for a packer to know at the time of processing what will be the ultimate destination of his product. Accordingly, if the states are free to regulate labeling on poultry products,

each item prepared must of necessity bear on its label all the information called for by each separate state which chooses to require material supplementary to that which is mandated by the federal act.

Although adding one piece of information to a label might not necessarily be an unlawful burden on interstate commerce, even in the absence of conflict with a federal statute, the necessity of meeting several, perhaps even conflicting, rquirements of different states could very easily become such. In the complex world of food package labeling, uniformity, has become a necessity for the free flow of commerce.

3. *The action of the Administrator in rejecting multiple weight labels reflected the fixed policy of the Department of Agriculture.*

On Page 4 of its motion papers appellee relies upon two instances of deviation as support for its assertion that the United States Department of Agriculture has no fixed policy on weight labeling. It is manifestly unfair to draw this conclusion from the testimony of the government witness. In the first instance, Mr. Hauver testified that the Poultry Division had granted temporary approval on an experimental basis for multiple weight labeling for a stuffed Rock Cornish Game Hen. The operation involved was very small, the stuffing process was performed by hand, and the quantity of stuffing weighed in advance. Even this limited approval had been withdrawn prior to the trial. The incident regarding the garnished ham involved a letter from an otherwise unidentified employee of the meat inspection division indicating that approval would be granted for use in New York City for a label showing separate weights on a garnished ham. There was no evidence introduced that an application for such a label was ever made or approval

actually granted. The record does contain a letter from Dr. DeHoll countermanding the impression given by the earlier letter (Plaintiffs' Exh. 9).

Contrary to the conclusion drawn by the appellee, the only fair conclusion to be drawn from the foregoing together with Mr. Hauver's testimony as a whole, is that the Department of Agriculture does indeed have a fixed policy on weight labeling and that that fixed policy is to permit the label to show only the net weight of the poultry product or meat product involved.

4. Plumley vs. Massachusetts *is not in point.*

On Page 6 of its motion appellee relies upon the case of *Plumley vs. Massachusetts, 155 U.S. 461 (1894)*, to support its contention that a product entering New York must comply with the state requirements. That case is inapposite because it was not concerned with any broad regulatory federal statute. The only federal act which was under consideration was a revenue act which in no way can be said to have regulated the sale of the product involved.

CONCLUSION

In light of the foregoing, together with the arguments and authorities, in appellants' Jurisdictional Statement, it is respectfully urged that the motion to dismiss or affirm be denied.

Respectfully submitted,

WILLIAM J. CONDON
WILLIAM J. COLAVITO
Attorneys for Appellant Swift & Company, Inc.
Office and P. O. Address
19 West 44th Street
New York 36, New York

EDMUND L. JONES
HOGAN & HARTSON
Attorneys for Appellant Armour and Company
Office and P. O. Address
800 Colorado Building
Washington 5, D. C.